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Office-Supreme Court, U.S.
FILED
JAN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-335

In The

Supreme Court of the United States

October Term, 1984

JOHN N. MITCHELL,

Petitioner,

v.

KEITH FORSYTH,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity in a damages suit against a public official.

2. Whether petitioner was entitled to qualified immunity in this case.

3. Whether the Attorney General is entitled to absolute immunity for his authorization of warrantless domestic national security electronic surveillances.

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BRIEF FOR THE RESPONDENT

STATEMENT

In this interlocutory proceeding petitioner, former Attorney General John N. Mitchell, claims that he is entitled to absolute or qualified immunity from suit for his authorization of warrantless electronic surveillances that resulted in the indisputably unlawful and unconstitutional overhearings of respondent's telephone conversations.

The wiretap in question was directed at one William Davidon and was intended to secure information concerning the East Coast Conspiracy to Save Lives (ECCSL).[1] In June, 1970, the FBI learned from an informer that members of this group had allegedly discussed a plan to damage underground heating systems in Washington, D.C., to further their political opposition to the war in Vietnam. At the same time, the FBI was informed that ECCSL may have been responsible for several draft board raids.

In August, 1970 this informer asserted that three persons, including Davidon, had discussed the possibility of kidnapping Dr. Henry Kissinger. A high level FBI official described these discussions as only "rhetorical". I.J.A., Ct. App. 143.[2] Moreover, it was clear that the earliest possible date for any attempt to implement any of these "plans" was February, 1971. *Id.*, 153. The FBI and Secret Service closely monitored this case through the informant and took steps necessary to prevent any harm to property or persons. A full scale criminal investigation was initiated in September, 1970, and indictments against eight alleged co-conspirators (not including respondent) were returned in January, 1971.

The wiretap in question, authorized by petitioner on November 6, 1970 was placed on November 24, 1970, and was terminated on January 6, 1971. It was effectuated without prior judicial approval, notwithstanding the rec-

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[1]A more detailed factual description of the events surrounding the authorization of the wiretap is set forth at pp. 28-34 *infra*.

[2]J.A. Ct. App., refers to the Joint Appendix in the court of appeals (Volumes I and II).

ommendation of a Justice Department prosecutor to secure a judicial order under Title III, 18 U.S.C. §§ 2510-2520. *Id.*, 193. Respondent Keith Forsyth was overheard on three occasions during the course of the contested wiretap. None of his conversations were in any way related to any alleged criminal wrongdoing or to any national security matter. Petitioner made no attempt to minimize the overhearings of *any* conversation monitored over this two month period and, as a result, the overhearings included numerous conversations plainly outside the stated purpose of the surveillance.

This action was filed in 1972 and sought damages for violations of respondent's rights under the Constitution and under Title III. Following discovery, the district court denied cross-motions for summary judgment. Pet. App. 117a.

Petitioner filed an interlocutory appeal from the denial of the summary judgment motion. The court of appeals ruled that the denial of qualified immunity was not a final judgment and therefore not appealable. With respect to the claim for absolute immunity, the court remanded for a hearing on the question of whether petitioner was absolutely immune from suit. Pet. App. 83a.

Applying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the district court denied petitioner's claims to immunity and ruled that respondent was entitled to summary judgment. Pet. App. 52a.

In resolving this issue, the district court merely assumed that the surveillance was for national security purposes (Pet. App. 59a), and because it denied qualified immunity, did not find it necessary to decide: (1) whether

there was a legitimate national security basis for this surveillance; (2) if so, whether the primary purpose of the surveillance was for national security or criminal investigatory purposes; (3) whether Title III was violated and, if so, whether damages could be awarded under that statute; and (4) whether the Fourth Amendment's reasonableness requirement was violated by petitioner's failure to minimize the overhearings. Each of these issues would need to be remanded in the event this Court reached the merits of this appeal and ruled in favor of petitioner on either immunity claim. By the same token a determination that the surveillance was not for legitimate national security reasons would moot the questions upon which *certiorari* was granted.

After the district court scheduled a hearing on damages,[3] petitioner requested certification of the liability issue under 28 U.S.C. § 1292(b). The motion was denied by the district court.

The court of appeals held that petitioner was not entitled to absolute immunity. The court ruled that petitioner had produced no evidence on remand to support a claim under *Imbler v. Pachtman*, 424 U.S. 409 (1976) and further held that petitioner's claim to a "special functions" basis for immunity was inconsistent with the Court's ruling in *Butz v. Economou*, 438 U.S. 478 (1978).

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[3]The hearing on damages would have been limited to a legal determination of respondent's claim to liquidated damages and attorney's fees under § 2520 and/or a claim for compensatory damages under the Fourth Amendment. *Cf. Carey v. Piphus*, 435 U.S. 247 (1978). Prior to the submission of the Petition for Certiorari, counsel for respondent informed trial counsel for petitioner that no claim for punitive damages would be made at the damages hearing. We confirm that position in this Court.

The court of appeals held that the denial of the claim of qualified immunity was not appealable under the collateral order doctrine, interpreting "*Harlow* as encouraging the summary disposition of insubstantial claims . . ., not as relaxing the rule limiting interlocutory appeals." Pet. App. 14a. The court also expressed its concern that allowing interlocutory appeals on this issue would greatly burden the courts of appeals. Judge Weis dissented and would have decided the merits of qualified immunity in favor of petitioner.

A petition for rehearing en banc was denied on April 3, 1984.

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SUMMARY OF ARGUMENT

I.

Under the collateral order doctrine a party must demonstrate that the issue upon which interlocutory appeal is taken (1) resolves an important issue that is separable from the merits of the action, (2) is effectively unreviewable on direct appeal, (3) is conclusively determined, and (4) creates only a narrow class of cases subject to appeal. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

Qualified immunity is not an issue that is collateral to the merits of the case. In contrast to the absolute immunity defense which is determined solely on a completely collateral issue (status and function of the defendant), qualified immunity decisions must include an analysis of the constitutional right asserted, the history of the right in

the courts, and the facts that are alleged to have implicated that right. All of these factors are equally relevant to the underlying merits of the case. In all significant respects, this defense is analytically and functionally equivalent to a motion to dismiss for failure to state a claim on the merits. Such motions are not appealable on an interlocutory basis. *Abney v. United States,* 431 U.S. 651 (1977).

Furthermore, as petitioner concedes, the qualified immunity issue will in some cases, "turn on disputed facts," Brief, 24, n.16, thus precluding interlocutory appeal. In many cases it will not be apparent whether these factual conflicts exist and therefore dividing the issue between "legal" and "factual" qualified immunity appeals will not be possible. Indeed, this case presents such a disputed factual issue, since the district court did not resolve the threshold question of whether there was a legitimate national security predicate for this surveillance. Moreover, since a determination of a purely legal qualified immunity defense will generally resolve the issue of liability, an interlocutory appeal is unnecessary to protect the defendant.

This Court's instruction that insubstantial claims not proceed to trial does not mean that all pre-trial decisions, which if decided in the favor of governmental defendants would terminate the litigation, are thus appealable on an interlocutory basis. Absolute immunity protects against the trial itself, no matter how substantial the underlying constitutional claim, while qualified immunity necessarily recognizes that either factually or legally substantial cases shall go to trial.

As a practical matter, expansion of the collateral order doctrine will cause a substantial increase in interlocu-

tory appeals, particularly because any defendant can claim that the right was not clearly established.

II.

Respondent's right to be free from warrantless electronic surveillance under the Fourth Amendment and Title III, 18 U.S.C. § 2510, et seq., was clearly established in 1970. This is conceded to be true if there was no national security interest involved, but even if such an interest is proven, *Katz v. United States,* 389 U.S. 347 (1967) made clear that electronic surveillance, like all searches, are subject to the warrant requirement. All searches conducted outside the judicial process are *per se* unreasonable, unless an exception to the warrant requirement had been established. Here, petitioner was seeking to establish a ***new*** exception to the Fourth Amendment in the face of clear precedent that national security does not exempt the executive from constitutional restraints or judicial review.

To the extent any issue was open, it was the question of whether *foreign* security surveillances were subject to the warrant requirement, a fact that was made clear to petitioner by Solicitor General Erwin N. Griswold.

Petitioner also violated clearly established Fourth Amendment law by failing to minimize the overhearings to national security matters. *See Berger v. New York,* 388 U.S. 41, 59-60 (1967).

Petitioner also violated Title III and therefore is liable for damages under 18 U.S.C. § 2520. § 2511(3) only exempted national security surveillances from the remedial aspects of Title III where the Executive in fact had the constitutional power to conduct such surveillance.

United States v. United States District Court (Keith), 407 U.S. 297 (1972), expressly rejected any such claim to constitutional exemption; therefore, the procedures and remedies of Title III were applicable.

III.

Petitioner's claim to absolute immunity is without support. First, with respect to the statutory claim, since Title III clearly covers all persons who engage in illegal wiretapping, official or absolute immunity was waived. Further, Congressional repeal of § 2511(3) removes any colorable claim that national security surveillances are not subject to Title III. Since the Attorney General would face trial on a statutory claim for warrantless national security surveillances, and because the Attorney General can make no claim to a constitutionally based immunity, the purported policy reasons for absolute immunity on the constitutional cause of action are irrelevant.

In addition, applying the stringent test this Court has developed in determining the appropriateness of a claim to absolute immunity, it is clear that the specific function he exercised is not one committed to the sole discretion of the Executive. To the contrary, as *Keith* emphatically confirms, a decision to employ electronic surveillance even in a domestic security area, requires prior judicial approval. Application of the absolute immunity doctrine would preclude any judicial review and is thoroughly incompatible with constitutional principle and sound public policy. Qualified immunity provides the Attorney General with very broad protection against liability and given the explicit commands of Title III and *Keith*, there is no basis

for his claim that he should be immune for deliberately violating settled law.

ARGUMENT

I. QUALIFIED IMMUNITY IS NOT SUBJECT TO INTERLOCUTORY APPEAL UNDER THE COLLATERAL ORDER DOCTRINE.

The rule that a party may not appeal under 28 U.S.C. § 1291 until the district court litigation is concluded on the merits "is an historic characteristic of federal appellate jurisdiction." *Flanagan v. United States,* — U.S. —, 103 S.Ct. 1051, 1054 (1984). It represents the "firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States, supra* at 656.

A narrow exception to that rule permits interlocutory appeals in a "small class" of cases in which an order, though technically not final (1) resolves an important issue that is collateral or separable from the merits of the action, (2) is effectively unreviewable on direct appeal, (3) conclusively determines the disputed questions, and (4) creates only a narrow class of cases subject to appeal. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374 (1981); *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). We submit that petitioner has failed to show that an order denying a motion for summary judgment based on qualified immunity meets any of these tests.

A. The Defense Of Qualified Immunity Is Not Separable From Nor Collateral To The Merits Of The Case.

This Court has consistently insisted that an order, to be considered collateral, must "not [be] enmeshed in the factual and legal issues comprising plaintiff's cause of action." *Mercantile National Bank v. Langdeau,* 371 U.S. 555, 558 (1963). Applying this test, it is not difficult to see why absolute immunity claims are collateral, while qualified immunity claims are not. Absolute immunity is determined solely on an issue genuinely collateral to the merits—the status and the function of the defendant, but qualified immunity is inextricably tied to the determination on the merits—the nature of the wrongful act and the law applicable at the time. The qualified immunity issue cannot be decided without an analysis of what right the alleged conduct is said to violate, of whether the claimed violation does indeed implicate a constitutional right, and of the history of the constitutional principles in question. This inquiry is plainly intertwined with the issue of whether the right asserted exists at all.

In this sense, qualified immunity—the lack of established law—serves a closely analogous role to a Rule 12(b) (6) motion to dismiss. Both apply an objective legal analysis and both are dependent on the facts and circumstances of the case—not the status of the defendant. Indeed, the only difference between the two is that a motion to dismiss on the merits is dependent upon whether the facts set forth a constitutional violation, while qualified immunity is dependent upon whether the right was clearly established at the time of the incident. A motion to dismiss for failure to state a claim is not collateral "in any

sense of that term; rather, it goes to the very heart of the issues to be resolved at the upcoming trial." *Abney v. United States, supra* at 663. The same must hold true for a motion based on qualified immunity.

Furthermore, as petitioner recognizes (Brief, 24-26, and n.16), the issue of qualified immunity may arise in significantly different contexts. Where the facts are undisputed petitioner argues for interlocutory review; where a qualified immunity claim turns on disputed facts, petitioner concedes that review is inappropriate.

Initially, petitioner fails to recognize the wide variety of cases in which there may be a sharp factual conflict with respect to the threshold issue of the purpose of the defendant's actions (here, whether there was a legitimate national security predicate for the surveillance, see pp. 28-34, *infra.*) In many cases if a defendant acted with an improper purpose, the qualified immunity issue is never reached. Consider, for example, where a plaintiff alleges a deprivation of First and Fourth Amendment rights based on an unlawful arrest for peaceful protest. In *Pierson v. Ray,* 386 U.S. 547, 557-58 (1967), this Court ruled that an officer could not be liable for making arrests under a statute only later declared unconstitutional, but remanded for trial on the issue of whether the arrest was in fact predicated on an attempt to prevent imminent violence or, as plaintiffs argued, to enforce clearly unconstitutional racial segregation where no threat of violence existed.

In *Harlow,* the Court remanded for a similar determination, and this important distinction has been consistently followed in the lower courts. See, e.g., *Hobson v.*

Wilson, 737 F.2d 1 (D.C. Cir. 1984) (whether surveillance of and other actions against plaintiffs was undertaken for political or legitimate law enforcement purposes); *Benson v. Scott*, 734 F.2d 1181, 1185-86 (7th Cir.), *cert. denied*, 83 L.Ed.2d 361 (1984) (whether refusal to supply plaintiff with legal representation caused by plaintiff's exercise of First Amendment rights); *Kenyatta v. Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984) (issue on immunity motion whether defendant's actions "undertaken in order to disrupt" exercise of rights and whether taken with "racial animus").[4]

Petitioner's submission that interlocutory appeals should be allowed in cases without these factual disputes, is highly impractical. How is a court of appeals to determine in advance of a complete review of the case whether there are disputed facts on the qualified immunity issue? The issues are not nearly as neatly divisible as petitioner would suggest, and the full resources of the court of appeals would have to be expended *before* it was determined that disputed facts precluded review.[5]

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[4]Defendants can also claim "extraordinary circumstances" to excuse their neglect of clearly established rules of law. *Harlow, supra* at 819. This claim will often raise factual issues that are inappropriate for summary judgment, and certainly should not be the basis for an interlocutory appeal. See *Keynatta v. Moore, supra*.

[5]A good example of this problem is provided by *Keynatta v. Moore, supra*, where the court of appeals, in refusing to hear this issue on an interlocutory basis, noted that the court's full review of the record revealed clear factual conflict (e.g., whether there was invidious racial discrimination), which in any event would have necessitated a remand. Notwithstanding this fact, the Department of Justice has now petitioned for rehearing in that case. That some constitutional violations require a showing of a defendant's state of mind is another factor that will

(Continued on following page)

Furthermore, in those cases where, as here, a constitutional violation is conceded and the only issue is the status of the law at the time of the incident, a denial of a defendant's motion for summary judgment will often render unnecessary any further proceedings on liability. By definition, the right was violated, no factual issues need be resolved and the merits are thus decided. Thus, further proceedings will only be necessary in those cases where punitive damages are requested. The number of cases in which plaintiff will vigorously pursue punitive damages and yet defendants are correct that plaintiff's constitutional rights were not clearly established will be quite small.[6]

B. The Order In Question Is Effectively Reviewable On Direct Appeal.

Petitioner's further effort to equate absolute and qualified immunity claims must fail because qualified immunity does not share the attributes, from either a conceptual or practical viewpoint, that warrant applying the collateral order doctrine to absolute immunity claims.

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often preclude summary judgment. See, *Washington v. Davis*, 426 U.S. 229 (1976) (intent to discriminate); *Estelle v. Gamble*, 429 U.S. 97 (1976) (deliberate indifference).

Moreover, *Harlow's* insistence that qualified immunity be decided before discovery, will make it difficult in some cases to determine the exact dimensions of the factual conflict.

[6]*Abney v. United States, supra* at 659, also requires a "complete, formal and, in the trial court, a final rejection" of the defendant's claim. Surely, in those cases where qualified immunity is denied, but factual issues as to the defendant's culpability must still be resolved at trial, there has not been this "complete" and "final" resolution of the claim.

An "absolute immunity" claim *must* be reviewed on appeal before trial because it is intended to provide an absolute protection against that very trial. Such immediate review is not necessary—and therefore should not be permitted—to preserve the integrity of "qualified immunity" because it is only an affirmative defense against liability in damages, *Harlow, supra* at 815, and, like all such defenses, is sufficiently protected by appellate review after final judgment.

The Court's cases recognize the critical significance of the "absolute" nature of the right at stake. For example, in *Abney v. United States, supra* at 661, defendant asserted rights protected by the Double Jeopardy Clause of the Fifth Amendment—which the Court described as "a guarantee against being twice put to *trial* for the same offense." In other words, the defendant was "contesting the very authority of the Government to hale him into court to face trial." *Id.*, at 659. That claim would necessarily be "effectively unreviewable," *Coopers & Lybrand v. Livesay, supra* at 468, if the defendant had to wait until after trial for appellate review. 431 U.S. at 662. See also *Helstoski v. Meanor,* 442 U.S. 500, 508 (1979) (the Speech or Debate Clause designed to protect Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves.)

By comparison, the claim of qualified immunity, like many issues which may be dispositive if successfully urged by a moving party, must await final judgment for appeal if wrongly decided by the district court. Motions to dismiss based on failure to state claims, statute of limitations, collateral estoppel, res judicata, laches, and lack of jurisdiction, to name a few, if successful will end the litigation before trial, but none are subject to interlocutory appeal.

Petitioner places much emphasis on this Court's admonition in *Harlow* that "insubstantial" claims should not proceed to trial. But *Harlow* also stressed that even where governmental officials are defendants, substantial and meritorious actions should be tried. This Court has not defined the term "insubstantial" in this context. However, where a district court has held that the rights were clearly established, the deference ordinarily shown to trial court rulings compels the conclusion that the claim is not "insubstantial" even if an appellate court would ultimately reverse.[7]

In *Kenyatta v. Moore, supra* at 1184, the court stated:

> The denial of a claim that does not encompass the right to be free from trial is not immediately appealable. The expense and strain of a trial are vicissitudes that affect every party, plaintiff or defendant, who is denied a summary judgment and then must undergo a trial. The trial itself trangresses the interests protected by qualified immunity only if the claim is insubstantial, and the defendant-official has nothing to appeal if he has failed to persuade a district judge that his defense is well-founded. . . . few if any district judges are likely to mistake insubstantial claims for violations of clearly established rights, far too few to invoke the *Harlow* policy of preventing the risk of litigation from deterring good candi-

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[7]In *Harlow,* the Court stressed that it was not providing "license to lawless conduct . . . where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 819. Respondent's claim, far from being "insubstantial," is premised on the most basic and important principles under the First and Fourth Amendments. His rights *were* violated and the only issue is whether petitioner should be relieved from damages liability.

> dates from seeking office or good office holders from performing their duties.

See also *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984).

Closely allied to the requirement that the order not be effectively reviewable on appeal is the principle that some irreparable harm be demonstrated as a requisite to interlocutory appeal. *Cohen, supra* at 546; *Firestone Tire & Rubber Co. v. Risjord, supra* at 378. In this case, the only unresolved issue is that of damages. No further hearings or testimony were necessary in the district court since respondent does not seek punitive damages, and compensatory damages will be awarded either as liquidated damages under 18 U.S.C. § 2520 or on a theory of constitutional deprivation. See n.3, *supra*.[8]

Finally, petitioner's attempt to cast his defense as qualified immunity from trial, Brief at 16, as opposed to a qualified immunity from damages liability, is unavailing given this Court's explicit statements to the contrary. Qualified immunity protects a defendant from an award of damages and not from a finding of liability for unconstitutional conduct. In *Davis v. Scherer*, — U.S. —, 104

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[8]It should also be noted that appeal may be had by certification under 28 U.S.C. § 1292(b). In this case, certification was denied because the trial court found, correctly we suggest, that such an appeal would not advance ultimate termination of the litigation, since only a determination of damages was left. Pet. App. 48a-49a. It is more than ironic, of course, that this litigation would have *concluded* in the trial court in 1979, had it not been for petitioner's two interlocutory appeals. Thus, petitioner's suggestion, Brief, 17, n.9, that "suits frequently linger in the trial court for inordinate periods" because of a failure to apply qualified immunity standards is surely disingenuous. See also *Kenyatta v. Moore, supra* (government appeals have delayed resolution for over six years).

S.Ct. 3012, 3018 (1984), the Court assumed that the plaintiff's due process rights had been violated:

> This finding of the District Court . . . *resolves the merits* of appellee's underlying claim for relief under § 1983. It does not, however, decide the issue of damages. Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from *liability for damages* unless it is further demonstrated that their conduct was unreasonable under the applicable standard. (emphasis added).

See also, *O'Connor v. Donaldson,* 422 U.S. 563, 577, n.12 (1975).

C. Expansion of The Collateral Order Doctrine To Include The Qualified Immunity Defense Will Cause A Substantial Increase In Interlocutory Appeals.

An important limitation on the collateral order doctrine is that it apply only to a "small class of interlocutory orders." *Nixon v. Fitzgerald, supra* at 742. Because the same qualified immunity defense raised by petitioner in this case is also asserted by many civil rights defendants, the class of qualified immunity cases is anything but small.[9] Qualified immunity is not a self-limiting doctrine since any defendant can claim that the right involved was not clearly established. *Cf. United States v. MacDonald,* 435 U.S. 850, 861-62 (1978). By comparison, cases involv-

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[9]Statistics compiled by the United States Judicial Conference reveal that in the 12 month period ending June 30, 1983 there were over 38,000-civil rights cases (including prisoner cases) filed in the district courts. 1983 *Reports of the Proceedings of the Judicial Conference of the United States [and the] Annual Report of the Director of the Administrative Office of the United States Courts,* Table C-3, "United States District Courts Civil Cases Commenced, By Nature of Suit and District As of June 30, 1983" at 248-249.

ing Double Jeopardy Clause immunity, *Abney v. United States, supra,* Speech or Debate Clause immunity, *Helstoski v. Meanor, supra,* or Presidential immunity are rare, precisely because they are self-limiting.

Petitioner urges immediate appellate review where a district court denies a qualified immunity defense. And it is highly likely that the defendant who is permitted to appeal will do so. Even if the appeal is unsuccessful on the merits, the defendant will have delayed the trial court proceedings, and the plaintiff will have suffered "the obstruction to just claims . . . the harassment and cost" of the interlocutory appeal. *Firestone Tire & Rubber Co. v. Risjord, supra* at 374.

As recognized by the Court below:

> "The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making." Pet. App. 15a.[10]

Moreover, that "crushing" impact on the appellate docket is almost entirely avoidable, since in many cases a denial

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[10]The argument that the appellate load would not be greatly increased because "it is not uncommon for defendant officials to assert claims of both absolute and qualified immunity," Brief, 18, is insupportable. Both *Bivens* and § 1983 suits would be subject to interlocutory appeals and the overwhelming number of these suits involve defendants who have no colorable claim to absolute immunity.

Further, *Abney v. United States, supra* at 662-63, specifically rejects the notion that the appealability of one issue can support interlocutory appeal of any other issue.

of qualified immunity will never reach the court of appeals for review, but rather will be incorporated into other resolutions of the case before appeal (e.g., settlement, defendants' success on other dispositive motions, judgment for defendants on the merits).[11]

II. PETITIONER VIOLATED RESPONDENT'S CLEARLY ESTABLISHED CONSTITUTIONAL AND STATUTORY RIGHTS.

A. Petitioner Knew Or Should Have Known That The Fourth Amendment Required A Warrant For Domestic National Security Electronic Surveillance.

In asserting a qualified immunity from liability in damages, petitioner claims that with respect to this surveillance the Fourth Amendment warrant requirement was not clearly established.[12] We submit that after *Katz v.*

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[11]Petitioner's assertion that he knows of no *federal* defendant who has taken an appeal from a denial of qualified immunity in the D.C. Circuit for the past two years is meaningless. The great majority of constitutional cases are against *state* officials under § 1983 and any rule announced in this case would be applicable in § 1983 litigation. See *Harlow, supra* at 818, n.30. In addition, in many cases, the appeal will involve no significant legal issue; rather, it will only involve the issue of whether the district court properly applied settled legal principles. *Cf. Nixon v. Fitzgerald, supra* at 743 (case involves "serious and unsettled questions.") Again, this kind of issue cannot be made grounds for interlocutory appeal without allowing virtually any pre-trial matter to come within the collateral order doctrine. See also *Firestone Tire & Rubber Co. v. Risjord, supra* at 379 (policy against interlocutory appeals based in part on respect for integrity of district courts).

[12]This argument assumes a fact not yet decided in this litigation: whether there was a legitimate national security predicate for this surveillance. See Point II B, *infra*. If this Court rules that a qualified immunity issue is appealable on an interlocutory basis, both issues should be remanded for a ruling on the merits. See *Harlow, supra* at 820.

United States, supra, it was clearly established that any warrantless search or electronic surveillance was unreasonable *per se,* except for limited exceptions that did not cover this case. Furthermore, to the extent any issue was open, it was the validity of warrantless taps to gather *foreign intelligence information.*

1. In this case, respondent's complaint rests on a cardinal principle of our constitutional system: that a government official may not conduct searches and seizures without prior judicial approval except in limited, specifically designated circumstances. If an exception to the warrant requirement has not been articulated, the Fourth Amendment requires a warrant before a person's privacy can be invaded. See *Thompson v. Louisiana,* 53 L.W. 3396 (U.S., Nov. 26, 1984); *Coolidge v. New Hampshire,* 403 U.S. 443, 454 (1971). The Court's construction of the Fourth Amendment gave petitioner no basis to believe that his actions in this case were lawful.

Well before the decision in *Katz v. United States,* 389 U.S. 347 (1967), the Court had made it unmistakably clear that it is the "*point* of the Fourth Amendment" that searches be authorized in advance by a "neutral and detached magistrate," except for narrowly drawn exceptions. *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Indeed, in *Thompson v. Louisiana, supra* at 3397, this Court again recognized the venerability of this rule:

> As we stated in *United States v. Chadwick,* 433 U.S. 1, 9 (1977), "in this area we do not write on a clean slate." In a long line of cases, this Court has stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

> Amendment—subject only to a few specifically established and well delineated exceptions." *Katz v. United States,* 389 U.S. 357 (1967) (footnotes omitted). *This was not a principle freshly coined for the occasion in Katz,* but rather represented this Court's long-standing understanding of the relationship between the two clauses of the Fourth Amendment. (emphasis added, footnote omitted).

See also *United States v. Jeffers,* 342 U.S. 48, 51 (1951) ("the burden is on those seeking [an] exemption to show a need for it.")

In *Katz* the Government claimed—as petitioner claimed with respect to this tap—that because its agents did no more than they might have done with prior judicial sanction, the search was proper. But the critical flaw in this assertion was that "this restraint was imposed by the agents themselves, not by a judicial officer." 389 U.S. at 356. They were not required to go before a detached, neutral magistrate. They were not compelled to observe precise limits established in advance by a specific court order. They were not required to notify the authorizing magistrate after the search had been completed of all that had been seized.

Katz applied settled constitutional standards in rejecting the government's request—not for exemption under an established exception—but for the creation of a "*new* exception" to the warrant requirement. *Id.* at 358 (emphasis supplied). Similarly, the Court's reservation of the claim that "safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security," *id.* at n.23, simply took note of the government's claim to a new excep-

tion in that area. *Keith* rejected the argument "that the special circumstances applicable to domestic security surveillances *necessitate a further exception* to the warrant requirement." *Id.* at 318 (emphasis added). Accordingly, as no exception to the settled law under the Fourth Amendment had been created in the area of national security, petitioner violated clearly established constitutional law. As Judge Swygert stated in *Zweibon v. Mitchell,* 720 F.2d 162, 175 (D.C. Cir. 1983) (dissenting opinion):

> Mitchell chose to ignore the principle on which *Katz* turned, apparently gambling that later Supreme Court decisions might limit the universality of *Katz* by establishing exceptions in national secuirty situations. Under the *Harlow* standard, however, government officials who depart from "settled, indisputable law" in the hope that an exception will later be created justifying their conduct do so at their peril. (footnote deleted).

2. The long-standing and clearly established protections that the Fourth Amendment provides against Executive invasions of privacy and political dissent were made clear in *Keith:*

> Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals who the officer might conclude were guilty of seditious libel.
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> • • •
>
> "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power," *Marcus v. Search Warrants etc.,* 367 U.S. 717, 724. History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its

> policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.

Id. at 313-314; 316.

This history, particularly in cases involving seditious libel, was a clear signal to petitioner that any attempt to create a new exception based on "national security" would be repugnant as well to closely related First Amendment doctrine. Petitioner sought to avoid Fourth Amendment restrictions in cases involving political dissidents, where clear first amendment interests were at stake, and did so under an unconstitutionally vague definition of national security.[13]

Furthermore, well before petitioner embarked upon his campaign to seek exemption from the Fourth Amendment, this Court had made it clear that an Executive claim to suspend or avoid constitutional protections in cases of national security would be found unconstitutional. See *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866).

In *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952), the Court refuted the claim for inherent power. Justice Frankfurter concurred (at 613):

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under

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[13]Petitioner defined national security interests as "those interests which protect the national security [and] they would range over very, very wide areas." II J.A. Ct. App. 96.

> restrictions from which other governments are free. It has not been our tradition to envy such governments.

Would petitioner have asserted a national security power to dispense with the warrant requirement when physically searching homes or personal papers? Would he have asserted this power to arrest "subversives" without probable cause, or to unilaterally suppress dissident organizational activity or the press? Obviously he could not. See, e.g., *New York Times Co. v. United States,* 403 U.S. 713 (1971); *United States v. Robel,* 389 U.S. 258 (1967); *Duncan v. Kahanamoku,* 327 U.S. 304 (1946); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115 (1851).

3. Petitioner's argument with respect to the foreign and domestic aspects of national security fails to apprehend an important historical distinction. *Katz* provided no reasonable basis for petitioner to believe that *domestic* national security electronic surveillances were not subject to the warrant requirement. As used in *Katz,* and as explicated by this Court in other cases, the exception for national security was limited to *foreign intelligence* surveillances.

In *Alderman v. United States,* 394 U.S. 165 (1969), the Court authorized trial judges to assess the legality of national security claims. That the Court believed some national security taps to be unconstitutional is made clear by its rejection of the Government's plea for non-disclosure of the logs:

> It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to *national security* or third-party interests. But this is a choice the Government concededly

> faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant. (emphasis supplied).

Id. at 184.

Alderman made it clear that courts were competent to review claims of national security. Indeed, to the extent that members of the Court were concerned with unlimited judicial review of "national security" matters, they very narrowly restricted the scope of that doctrine.

Justice Harlan limited national security to espionage cases, to those "in which the defendant is charged . . . with spying for a foreign power." 394 U.S. at 198. Justice Fortas characterized "national security material" as a "rigid and limited" category, including only activities "specifically directed to acts of sabotage, espionage, and aggression by or on behalf of foreign states." 394 U.S. at 209.

Justice Stewart, author of the *Katz* opinion, concurred in *Giordano v. United States*, 394 U.S. 310, 313 (1969), and termed the putative exception as one relating to the "gathering of foreign intelligence information." He noted the necessity of protecting "national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. Of course, all of these definitions encompass saboteurs and spies, not domestic political groups.[14]

Thus, as of 1970, the only possible open question related to foreign intelligence surveillance. Petitioner's

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[14]Justices Douglas and Brennan were of the view that there was *no* national security exception under the Fourth Amendment's warrant requirement. *Katz, supra* at 359-60.

reliance on *United States v. Dellinger,* No. 69-Cr.-180 (W.D. Ill. Feb. 20, 1970) and *United States v. O'Neal,* KC-CR-1204 (D.Kan. Sept. 3, 1970) is misplaced. *Dellinger* involved a surveillance that sought *"foreign intelligence information."* J.A. 32. The purpose of the tap in *O'Neal* is not clear, but both *Dellinger* and *O'Neal* relied on *United States v. Clay,* 430 F.2d 165 (5th Cir. 1970) which involved foreign intelligence matters, and where the Government *conceded* the illegality of warrantless domestic security taps.[15]

The unconstitutionality of domestic national security surveillance was so clearly established at the beginning of petitioner's tenure as Attorney General that in April, 1969, the Solicitor General, Erwin N. Griswold, advised petitioner that a wiretap of an individual or organization which had no foreign intelligence information and which was not necessary for the protection of national defense secrets and installations from foreign espionage and sabotage was indefensible under Supreme Court rulings:

> It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations or any officers or members of such organizations. *I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all elec-

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[15]Moreover, petitioner promulgated his warrantless "national security" program on May 6, 1969, well before the *O'Neal* and *Dellinger* cases, and there is no evidence that he relied on these decisions in authorizing this surveillance.

> tronic surveillance is unconstitutional if conducted without a warrant. I.J.A. Ct.App. 230. (emphasis added).

A response to this memorandum prompted the Solicitor General to state: "[i]f a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes." I.J.A. Ct. App. 238-239.

A statutorily prescribed manner of seeking judicial clarification of the constitutional issue regarding the validity of the warrantless electronic surveillance was also available. See 18 U.S.C. § 2518(7) (emergency judicial approval available after tap installed). Proceeding under that provision would have protected against constitutional abuses while affording petitioner sufficient latitude in decision-making; thus, it is simply fatuous to suggest that he was forced into a "gambling game in which crushing personal liability becomes a cost of making erroneous guesses . . . " Brief, 33.[16]

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[16]It is also noteworthy that from 1940 to 1958 various Attorneys General sought Congressional legislation to authorize electronic surveillance. Despite repeated protestations that they were unable to carry on these surveillances in the absence of specific legislative authorization, Congress consistently refused to pass legislation conferring this power, even in national security cases. See Theoharris & Meyer, *The National Security Justification for Electronic Eavesdropping, An Elusive Exception*, 14 Wayne St. L. Rev. 749 (1968).

Nor could petitioner have reasonably relied on the fact that some Presidents had authorized wiretapping since all such activity took place in the pre-*Katz* era where non-trespassory surveillances were not unconstitutional.

B. The Record In This Case Demonstrates That There Was No Legitimate National Security Predicate For The Electronic Surveillance.

The district court did not decide whether the surveillance at issue was in fact based on proper national security considerations. Of course, the failure of petitioner to demonstrate a legitimate national security basis for the surveillances would establish liability under § 2520 and the Fourth Amendment. See *Keith, supra,* 407 U.S., at 339-341 (White, J., concurring); *Zweibon v. Mitchell,* 516 F.2d at 671, n.274; at 681 (McGowan, J., concurring).

The record in the case demonstrates that the electronic surveillance was not properly conducted for purposes of national security; further, even assuming that security interests were involved, there is an open factual question as to the primary purpose of the surveillance. Thus, even if the right violated was not clearly established, the case must be remanded for consideration of these issues.

1. Petitioner assumes that an Attorney General's assertion of national security precludes judicial review. But, the principle that purported national security surveillances are subject to the full scope of judicial review under the Fourth Amendment was critical to the holding in *Keith.* In requiring prior judicial authorization, the Court emphatically rejected the Government's assertion that national security factors are not capable of competent judicial determination:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. . . . If the threat is too subtle or complex for our senior law enforcement officials to convey its significance to a court, one

> may question whether there is probable cause for surveillance. *Id.* at 320.

In other contexts the Court has refused to allow alleged national security interests to limit judicial scrutiny of legislative or executive actions. See *United States v. Robel, supra* at 263-64 (1967) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *Knauff v. Shaughnessy,* 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("Security is like liberty in that many are the crimes committed in its name").

A Select Committee of the United States Senate addressed the abuses of national security electronic surveillances:

> The imprecision and manipulation of labels such as 'national security,' 'subversive activities,' and 'foreign intelligence' have led to unjustified use of these techniques . . . The very intrusiveness of these techniques demands the utmost circumspection in their use. But with vague or non-existent standards to guide them, and with labels such as 'national security' and 'foreign intelligence' to shield them, executive branch officials have been all too willing to unleash these techniques against American citizens with little or no legitimate justification.

"Intelligence Activities and the Rights of Americans," *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities,* Report No. 94-755, United States Senate, at pp. 183-184; 209.

In fact, the Committee found that:

> The legal limitations on domestic wiretapping apparently did not concern officials in the White House or

> Attorney Generals who requested the FBI to do their bidding. In some instances, they specifically requested the FBI to institute wiretaps on American citizens with no substantial national security predicate for doing so. *Id.* at 162.

In this case, given petitioner's arbitrary definition and broad application of national security, "the danger of abuse in acting to protect that interest becomes apparent." *Keith, supra* at 314.[17]

2. Here, the Court need not reach the constitutional issue since petitioner, on this record, has failed to demonstrate that the surveillance comes within the *statutory* definition of national security in 18 U.S.C. § 2511(3). In defending this surveillance, the Attorney General submitted an affidavit claiming that the "electronic surveillance was authorized by the President of the United States, acting through the Attorney General, in the exercise of his authority relating to the national security *as set forth in 18 U.S.C. 2511(3).*" (emphasis added). J.A. 23. Under § 2511(3), the surveillance could not properly be based on national security unless it was demonstrated that it was "necessary to protect the United States against the overthrow of the Government by force or unlawful means or against any other clear and present danger to the structure or existence of the Government."

Initially, there was no plan here to "overthrow" the Government. And it is not at all clear that the plans to disrupt utility services to some federal buildings or to

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[17]It is also worth recalling that petitioner has previously invoked "national security" as part of a criminal scheme. *United States v. Haldeman*, 559 F.2d 31, 54 n.15 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (faked national security claim to foil investigation of Watergate cover-up).

kidnap Dr. Kissinger, as serious crimes as these may be, constituted a danger to the "structure or existence" of government. Moreover, whatever threat existed was plainly not a "clear and present danger." Significantly, neither the affidavit submitted by the Attorney General concerning this tap, J.A. 23, nor the authorization itself, I.J.A. Ct.App. 133, which was submitted by Director Hoover for petitioner's approval, made any assertion that there was a clear and present danger to the structure or existence of the government. Thus, assuming *Harlow* should be applied in a manner which precludes consideration of the fruits of discovery, petitioner fails to establish his claim. See *Keith, supra* at 335-344 (White, J., concurring). Petitioner's definition of national security, including his assertion that he had "no other guidelines" than his own beliefs as to the scope of national security matters, II.J.A. Ct.App. 96, utterly fails to satisfy the specific language of Tile III.

If the entire record of this case is considered, there is an issue of fact as to whether the plans presented a clear or present danger to the existence of Government.[18] A high FBI official stated that there were "no concrete plans" and that the "kidnap plot" was "rhetorical." I.J.A. Ct.App. 142-43. The Government was kept fully informed of the details of the plans, through the use of a well-placed informant and, since the alleged criminal acts were projected for a sufficiently lengthy time in the fu-

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[18]In *Brandenburg v. Ohio,* 395 U.S. 444 (1969), this Court ruled that a state may "not forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to initiate or produce such action." *Id.* at 447 (emphasis added).

ture, no present danger existed. Accordingly, the Government had sufficient recourse, including indictment and arrest, to protect itself and to prevent any serious overt acts.

3. The trial court did not expressly decide whether national security, criminal investigation or political intelligence was the primary purpose of the surveillance. We do not discuss all of the facts that bear on this issue; nor does the procedural setting of this case call for a full analysis of the legal standards to be applied. See, e.g., *Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979). Rather, the following is set forth solely to demonstrate the existence of a disputed issue of fact.

In September, 1970, the Philadelphia office of the FBI was assigned primary responsibility for the criminal investigation of ECCSL. On October 12, 1970, the Philadelphia office requested the Director FBI and Department of Justice to evaluate its Report with reference to the "timing of legal moves." I.J.A. Ct.App. 156. On October 13, 1970, the Report was transmitted by the FBI to the Criminal Division of the Department of Justice with a request from the FBI "for a prosecutive opinion." The Philadelphia office advised, as early as October 12, 1970, that the FBI should consider electronic surveillance of the subjects of the criminal investigation. *Id.,* at 157.

On November 13, 1970, the case attorney from the General Crimes Section of the Criminal Division recommended that the FBI conduct "a full scale investigation using appropriate investigative methods, including court-approved wiretaps." *Id.,* at 193. Thus, at the same time that warrantless wiretapping had been authorized by the Attorney General on grounds that "it would be a prac-

tical impossibility to submit to the Court all of the facts, circumstances, and other considerations upon which [the] authorization was based," J.A. 23, the attorney from the Department of Justice who was charged with evaluating, and later presenting the case to the grand jury for indictment, had concluded that electronic surveillance of criminal activity could and should be used pursuant to *court* authorization under Title III.

By November 19, 1970, the Criminal Division had reached a decision to prosecute for the alleged conspiracy. I.J.A. Ct.App. 202. On November 24, 1970, at a conference between FBI and Department of Justice personnel, the FBI maintained "that it was imperative to bring the case to a prosecutive point as soon as practicable . . ." *Id.*, at 200. On November 30, 1970, plans were made to obtain indictments on December 16, 1970. *Id.*, at 203.

The surveillance was started on November 24, 1970 (five days *after* the decision to prosecute) and, with a thirty day extension approved by petitioner on December 7, 1970, was kept in operation through January 6, 1971. *Id.*, at 213.

On November 27, 1970, FBI Director Hoover, in testimony before a Senate Committee, disclosed the fact that the FBI was investigating the ECCSL with respect to the alleged kidnapping plans. This testimony was widely reported, see, e.g. *New York Times,* Nov. 28, 1970, p.1, and sparked a national debate on the charges. Thus, as of this date, the FBI had fully monitored these plans and had

disclosed to the alleged conspirators that the government had full knowledge of their activities.[19]

There is, in the documents in this case, a remarkable lack of emphasis on so-called national security matters. Furtherance of the criminal investigation and an attempt to gain information concerning the political activities of William Davidon and his associates emerge as the overriding interests of the Department of Justice.[20]

In addition to gathering information to support a criminal investigation, the surveillance was used to obtain information regarding Davidon's legitimate dissident political activity. For example, the re-authorization for this surveillance, signed by petitioner on December 7, 1970, was primarily concerned with the criminal investigation and Davidon's political activity. FBI Director Hoover requested an extension of the tap based on the assertion that it had produced "highly significant" information that had been overheard. Yet the record shows that the initial surveillance produced nothing of value with regard to national security. It did reveal plans of Davidon and others to hold a press conference concerning Hoover's Congressional testimony. *Id.*, 212-213.

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[19]Indictments were eventually returned in January, 1971. The defendants were not convicted of any charges relating to kidnapping and destruction of heating tunnels. See, *United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1972).

[20]In *United States v. Ahmad*, 347 F.Supp. 912, 936 (M.D. Pa. 1972) at a hearing on this very surveillance, the Government stated that a purpose of the surveillance was to further their criminal investigation.

C. The Failure To Minimize The Overhearings To National Security Matters Rendered The Surveillances Unreasonable Under The Fourth Amendment.

The district court did not address an additional claim made by respondent: whether petitioner violated the Fourth Amendment's well established reasonableness requirement by authorizing surveillances in which there was absolutely no attempt made to minimize overhearings of non-national security matters.

In *Berger v. New York*, 388 U.S. 41, 59-60 (1967), the Court held that the Fourth Amendment requires that an electronic surveillance be aimed at specific communications relevant to the investigation rather than "a roving commission to 'seize' any and all conversations." Thus, the surveillance must be minimized to avoid interception of non-pertinent conversations, particularly of persons unrelated to the investigation. *Keith* confirmed the principle that some degree of minimization would be necessary in the national security area, even if the standards applied would be different than those applicable to criminal investigations. Such standards must be "reasonable both in relation to the legitimate need[s] of Government . . . and the protected rights of our citizens." *Keith, supra* at 323. See also, *Scott v. United States*, 436 U.S. 128 (1978).[21]

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[21] *Katz v. United States, supra,* did not question the reasonableness requirement with respect to national security wiretaps. It therefore was clearly established after *Katz* that executive branch officers who conducted national security wiretaps were required to observe the reasonableness requirement of the Fourth Amendment.

In this case, in the context of an investigation of a group that "fervently dispute(d)" the government's policies, *cf. Keith, supra* at 313, 314, as a matter of policy, there was absolutely no minimization of the overhearings. II.J.A. Ct.App. 88-90. Respondent's protected conversations were overheard and recorded without any regard as to whether they may have been related to the alleged security purposes of the surveillance. *Id.* at 215-222. This disregard of the reasonableness requirement of the Fourth Amendment violated principles that were clearly established in 1970.

D. Respondent Established A Claim For Damages Under Title III.

Petitioner also violated statutory law by failing to secure a warrant under Title III.[22] The applicability of Title III to this surveillance hinges on Section 2511(3). That provision enumerates five national security situations in which surveillance would not be subject to the procedures and remedies of Title III, *if* the President in fact had the Constitutional power to conduct such surveillances without a judicial warrant.

In *Keith*, this Court stated:

> "Section 2511(3) certainly confers no power, as the language is wholly inappropriate for that purpose. It merely provides that the act shall not be interpreted to limit or disturb such power as the President may

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[22]This issue, too, was not resolved below and it should be remanded. Accordingly, the brief argument presented in this section is made solely to show the basis of respondent's statutory claim.

> have under the Constitution. In short, Congress simply left Presidential powers where it found them."

Id. at 303.[23]

As stated by Senator Hart in Senate discussion of § 2511(3) (at 114 Cong. Rec., 308):

> As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by Title III.

In *Zweibon I*, 516 F.2d 594, 659-670, the court held that a warrantless foreign intelligence electronic surveillance is subject to the damage remedies of 18 U.S.C. § 2520. *Zweibon* concluded that § 2511(3) protected the President's authority to conduct national security electronic surveillance where he had that power, but at the same time to make the procedures and remedies of Title III applicable to all other wiretapping, including that done in the name of national security where a warrant *is* required. *Id.* at 656-66. ". . . *the procedures and remedies . . . were to completely occupy the wiretapping field.*" *Id.* (Emphasis in the original.)

Furthermore, petitioner cannot defeat liability on the statutory claim on the theory of a good faith defense. At the time of the surveillance, 18 U.S.C. § 2520 provided:

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[23]The subject matter of "national security" is not exempt from the Act's coverage. § 2516(a) includes those offenses that fall within the national security category. Senate Report No. 1097, 90th Congress, 2d Sess. 97 (1968).

> "A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter [governing emergency powers] shall constitute a complete defense to any civil or criminal action brought under this chapter."[24]

In its requirement of reliance on a specific court order or the emergency provisions, the statutory standard of defense is a significantly narrower one than that afforded by the common law. The adoption of the language of § 2520 in the face of an existing common law standard must be seen as a pre-emption of that standard in cases involving violations of the statute. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).[25]

III. PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR WARRANTLESS NATIONAL SECURITY SURVEILLANCES.

Petitioner's claim that he is entitled to absolute immunity for all actions taken "to protect the national security" is meritless. It fails on both statutory and constitutional grounds and should be emphatically rejected by this Court.

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[24] § 2520 was amended, effective, February 1, 1971.

[25] We recognize that four of the eight members of the court in *Zweibon I* held that a common law "good faith" defense is available under § 2520. However, the plurality opinion, was written prior to the *Albermarle* decision and was concerned chiefly with the scope of foreign intelligence wiretapping. *Zweibon III*, 606 F.2d 1172, denied retroactive effect to the ruling in *Zweibon I* with respect to Title III liability. However, this ruling again focused on foreign security issues and was further predicated on the assumption that a remedy was available directly under the Constitution. *Id.* at 1182. If relevant, the retroactivity issue should be remanded to afford the parties opportunity to litigate this issue.

1. Initially, it is important to recognize a fact that is ignored by petitioner: Congress has eliminated any possible claim that the Attorney General may have to absolute immunity for the particular function at issue in this case. Under Title III, there can be no question but that the Attorney General, like every other person, is liable in damages for illegal wiretapping. 18 U.S.C. § 2520. The only defense for these officials is that set forth in § 2520—reliance on a court order or legislative authorization.[26] Furthermore, Congressional *repeal* of § 2511(3) (Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797), which was petitioner's sole defense to the statutory damage claim, conclusively establishes that the Attorney General is now liable under Title III for warrantless national security wiretapping.

This fact is dispositive not only of any claim for absolute immunity from statutory damages, but more important, it forecloses the claim to absolute immunity on the constitutional cause of action. Since the Attorney General would be subject to suit and damages under the statute, any purported policy reasons for providing absolute immunity from suit on constitutional grounds are rendered irrelevant. The facts and the legal issues in both causes of action would be virtually identical and no legiti-

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[26]In the district court, petitioner properly conceded that Title III waives any absolute immunity (Defendants' Response to Plaintiff's Cross-Motion For Summary Judgment, at 50, n.50). Congress clearly has the power to define and limit immunities. See *Albermarle Paper Co. v. Moody, supra; Campiti v. Walonis*, 611 F.2d 387, 394 (1st Cir. 1979).

mate purpose could be served by granting immunity on one theory, when it is unavailable on the other.[27]

2. Even assuming that Congress had remained silent on this issue, petitioner's broad assertion that all decisions taken to protect the nation from threats "such as violence, terrorism, subversion or espionage" (Brief, 36) require a complete shield from liability cannot be supported, even by the dictum in *Harlow, supra* at 812. *Harlow* makes clear that a government official seeking the extraordinary protection of absolute immunity must (1) "show that the responsibilities of his office embraced a function so sensitive as to require a total shield of liability" and (2) "demonstrate that he was discharging the protected function when performing the act for which liability is asserted." *Harlow,* 457 U.S. at 814.[28]

Harlow rejected "undifferentiated extension" of absolute immunity to Presidential aides because it was inconsistent with the "functional" analysis required by prior opinions. This Court certainly did not suggest that absolute immunity could, in one breath, be conferred on all decisions in the national security "area," but simply that such immunity might be necessary to protect the unhesitating performance of some "special functions" vital to

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[27]Unlike *Nixon v. Fitzgerald, supra,* there is no claim here that absolute immunity is constitutionally required for the Attorney General; rather, petitioner relies on a range of policy reasons.

[28]Again, the threshold issue, not yet decided, is whether petitioner was "discharging any national security functions. The only exception which has been made to this rule was for the President, whose "unique" and "singular" constitutional role was repeatedly stressed by the Court. *Nixon v. Fitzgerald, supra* at 751-753.

the national interest within that area. In a particular case in the future, this Court may hold that there are some functions related to national security for which officials require absolute immunity, a question that obviously need not be reached, but to prevail in this case petitioner must show that the specific decisions made here were "so sensitive as to require a total shield from liability." *Id.*

The present case, of course, lends itself to precise analysis. The conduct in question is petitioner's decision to authorize electronic surveillance of telephone conversations without seeking prior court approval and to forego any minimization of interceptions. The proper question presented is whether these specific decisions were functions requiring absolute immunity.

It is readily seen that these specific functions are not among those as to which executive officials enjoy absolute discretion. To the contrary, this Court has ruled that the decision to employ electronic surveillance in the domestic security area must be made subject to judicial approval. *Keith, supra* at 316-317. In *Keith,* this Court considered interests identical to those at stake in this litigation, including the Government's asserted need to be completely shielded from judicial review in the domestic security area, and concluded that:

> The Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. *Id.* at 321.

Long before *Keith,* this Court had made it clear that the executive branch may not dispense with the requirements of the Constitution by asserting that an action is required by the national security. See p. 29, *supra.* Historical-

ly, the Court has also resisted the pressure of such arguments in actions for damages. *Little v. Barreme,* 2 Cranch 170 (1804); *Mitchell v. Harmony, supra.*

Petitioner's request for absolute immunity here is in fact nothing other than an attempt to reargue *Keith.* Most fundamentally, it conflicts with *Keith* because the specific function involved—national security wiretapping —is in all circumstances subject to the Constitution's requirement of prior judicial approval. This is an area "in which the public interest is demonstrably on the side of encouraging less 'vigor' and more 'caution' on the part of decisionmakers," *Nixon v. Fitzgerald, supra,* 102 S.Ct. 2722-23 (White, J., dissenting). Application of the absolute immunity doctrine would preclude any judicial review and thus is incompatible with the overriding constitutional mandate.

Moreover, petitioner seriously overstates the issue when he poses the specter of a public official frozen into inaction by the fear of personal damages liability in the face of a need to act promptly and decisively to protect the national security. Putting aside the substantial protection afforded by the qualified immunity standard, petitioner could have acted promptly by immediately seeking a warrant for the electronic surveillance or he could have proceeded under the provisions of § 2518(7). The issue here was not between action and inaction, but only between action pursuant to constitutional and statutory procedures and action which violated respondent's constitutional rights. Petitioner's only justification for his failure to seek a warrant in this case was that the matter at hand was too complex to present to a judge. II.J.A. Ct.App.

132. This idea was explicitly rejected by this Court. *Keith, supra* at 320-21.[29]

Finally, to the extent petitioner moves from a specific functional analysis, his failure to define "national security" in anything other than tautological terms (II.J.A. Ct. App. 96) is convincing evidence of the undifferentiated nature of his claims. To grant the Attorney General absolute immunity for any and all acts taken to protect national security would be to invite claims covering a vast array of governmental operations, precisely the sort of abuse *Keith* sought to prevent.[30]

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[29]Similarly, petitioner's failure to order minimization of overheard conversations does not qualify as such a sensitive function. While the scope of conversations considered pertinent may be broader than in a conventional criminal investigation, petitioner was clearly under an obligation to develop some standards "compatiable with the Fourth Amendment. . . reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens." *Keith, supra* at 322-323. In doing so, he would be exercising essentially an ordinary police function (although perhaps with a different vocabulary due to the subject matter of the investigation) that is outside of the limited absolute immunity for prosecutors for the initiation and presentation of criminal cases. See *Imbler v. Pachtman, supra*. No national security interest could justify the refusal to minimize the overhearings of non-national security, constitutionally protected conversations.

[30]Much of petitioner's argument on absolute immunity revisits earlier submissions by the Government which this Court has rejected. Petitioner would rely on the "many personal, psychological and ethical constraints that animate the vast majority of our public officers." This misses the point. Damage actions are required not to affect the actions of the majority of officials, but because of the minority who abuse their positions and violate the constitutional rights of citizens. In this respect the law recognizes the truth of Lord Acton's oft-cited warning that "Power corrupts and absolute power corrupts

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3. Absolute immunity is inappropriate in this case for the further reason that petitioner is unable to meet the heavy burden of showing why qualified immunity does not afford sufficient protection to the Attorney General. This Court has held that even high-ranking officials such as cabinet officers, *Butz v. Economou, supra,* and White House assistants, *Harlow v. Fitzgerald, supra,* are adequately protected by qualified immunity. Moreover, the Court has recognized that absolute immunity may work the greatest mischief when conferred upon high-ranking officials:

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. *Butz v. Economou, supra* at 505-560.[31]

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absolutely." The recent history of constitutional violations on the part of certain governmental agencies has done little to diminish the force of this observation.

Given the decision in *City of Los Angeles v. Lyons,* — U.S. —, 103 S.Ct. 1660 (1983), for the government to argue that injunctive actions are an effective means of judicial review of misconduct of the sort alleged in this case, it would have to contemplate a more oppressive future regime of electronic surveillance than occurred during petitioner's tenure.

[31]Petitioner suggests that an official may be hamstrung in his ability to litigate because he may have relied on national

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To protect the rights of citizens as well as to allow public officials an appropriate degree of flexibility in interpreting and enforcing the law, the Court has developed the doctrine of qualified immunity which provides substantial protection to public officials. *Davis v. Scherer, supra.* Petitioner gives no reasons why the Attorney General would not always find such protection as he deserves from the objective standard of the qualified immunity defense, and in particular the "extraordinary circumstances" excuse for neglect of clearly established rights.

Where a court can determine that at the time an official violated the plaintiff's constitutional rights the law was clearly established, "he should be made to hesitate . . ." *Harlow, supra* at 819. Petitioner's brief reveals that the Government still does not appreciate this point. Petitioner asserts, "When the Attorney General is called upon to take action to protect the security of the nation, he should think only of the national good and not about his pocketbook." Brief, 48. This conclusion betrays a continuing failure to understand that any public official, particularly the Attorney General, has a constitutional obligation to weigh not only the "national good," but also the risk of injury to the rights of individuals.

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security information he cannot disclose to the court. But this privilege most often prejudices a plaintiff who may thereby be unable to litigate his claim. See *United States v. Reynolds,* 345 U.S. 1 (1953); *Halkin v. Helms,* 690 F.2d 977 (D.C. Cir. 1982). Absolute immunity for the Attorney General in all cases related to national security is not required to avoid this problem.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed and the case remanded to the District Court.

Respectfully submitted,

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